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In the Supreme Court of the United States

OCTOBER TERM, 1979

COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE, PETITIONER

v.

BOB BERGLAND, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 23a-36a) is not yet reported. The decision of the district court (Pet. App. 16a-22a) is unreported. The previous order of the court of appeals remanding the case for further consideration (Pet. App.

12a-13a) is unreported. The initial decision of the district court (Pet. App. 1a-11a) is reported at 434 F. Supp. 314.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1979. The petition for a writ of certiorari was filed on March 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the discharge of high-ranking officials in the Department of Agriculture, in order to appoint individuals who supported the policies and programs of the administration, violated the First Amendment.

STATEMENT

Petitioner is an *ad hoc* committee composed of former employees of the Department of Agriculture who occupied positions in the field service either as State Executive Directors of the Agricultural Stabilization and Conservation Service (ASCS) or as State Directors of the Farmers Home Administration (FmHA) (Pet. 4; Pet. App. 1a, 24a). Petitioner brought this action to challenge the discharge of its members by the Department as a violation of, *inter alia*, the First Amendment.

1. The ASCS is an agency within the Department of Agriculture (Pet. App. 2a). Its principal functions include the administration of the acreage allotment and farm marketing quota program and of

commodity price support and farmland conservation programs (*id.* at 2a-3a). Each state has an ASCS State Executive Director who is appointed by the Administrator of ASCS upon the recommendation of the state committee (*id.* at 3a). The State Executive Director occupies a GS-13 to GS-15 position (*id.* at 9a) and is (*id.* at 9a-10a)

> [f]ully responsible for planning, organizing, and directing the program and management operations of ASCS activities throughout the State. Within broad policy, makes decisions and commitments on all phases of administration of the assigned programs, and actively participates * * * in State ASCS program and policy formulation. Recommends changes and revisions in State and National policies.

FmHA is an agency within the Department of Agriculture that is responsible for loan, grant, and other assistance programs for the benefit of rural areas (Pet. App. 3a). FmHA has 42 state offices, each of which is under the supervision of a State Director who is responsible to the FmHA Administrator (*ibid.*). The State Director holds a GS-15 position (*id.* at 9a) and (*id.* at 10a)

> [f]ormulates and implements the total [FmHA] program within the State jurisdictional area, exercising executive leadership in developing and implementing operating principles and practices desirable or necessary to promote and achieve the purposes and objectives of the overall [FmHA] program or specialized phases thereof. Gives

emphasis to development of annual goals and long-range plans of operations.

The positions of ASCS State Executive Director (5 C.F.R. 213.3113(d)(3)) and FmHA State Director (5 C.F.R. 213.3113(e)(4)) were designated Schedule A positions by the Civil Service Commission (Pet. App. 4a).[1] Schedule A officials are one of three groups excepted from the competitive civil service pursuant to 5 U.S.C. (Supp. II) 3302 and 5 C.F.R. 6.2 and 213.3101 *et seq.* The three excepted service groups are defined as follows (5 C.F.R. 6.2; Pet. App. 4a-5a):

> *Schedule A.* Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.
>
> *Schedule B.* Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such noncompetitive examination as may be prescribed by the Commission.
>
> *Schedule C.* Positions of a confidential or policy-determining character shall be listed in Schedule C.

2. Shortly after respondent took office in 1977, he directed that a review be made of all incumbent

[1] The Commission's duties in this regard have now been assumed by the Office of Personnel Management. See 5 U.S.C. (Supp. II) 1101 *et seq.*

ASCS and FmHA directors to determine which individuals were of such outstanding quality that they should be retained in the new administration (Pet. App. 5a). This review was conducted by the Acting Administrators of ASCS and FmHA based on their personal knowledge of those officials and their lengthy experience with the Department's programs (*ibid.*). On April 22 and April 25, 1977, the Department discharged 17 ASCS State Executive Directors and nine FmHA State Directors (*id.* at 2a).[2]

3. Petitioner brought this action in March 1977 for declaratory and injunctive relief to challenge the anticipated dismissal of its members as, among other things, a violation of the First Amendment (Pet. App. 1a-2a). Petitioner alleged that its members were to be discharged "on the basis of their political beliefs and associations" and that respondent was "dismissing and threatening to dismiss [petitioner's] members from their positions * * * for partisan political reasons and threatening to and has appointed political supporters of the Carter administration to the positions now occupied by [petitioner's] members in consideration of their political support" (*ibid.*). On April 25, 1977, petitioner sought a temporary restraining order to enjoin the announced discharges.

[2] Because of a statutory preference for veterans, these discharges were limited to persons who were not veterans (Pet. App. 6a, 34a n.20). At the time, there were 20 non-veteran ASCS State Executive Directors and 14 non-veteran FmHA State Directors (Govt. C.A. App. 161-162, 190, 199).

After denying the temporary restraining order, and following an evidentiary hearing on petitioner's request for a preliminary and permanent injunction, the district court dismissed the complaint (Pet. App. 1a-11a, 26a). The court found that, in light of the Department's traditional practices, "it was generally understood and expected that the incumbents would be replaced by individuals who supported the policies and programs of the new administration" (*id.* at 6a). The court also found that "[a]lthough all incumbents, except one, were appointed during the Nixon-Ford administrations, the testimony was uncontroverted that the Carter administration did not know in fact to which political party the incumbents belonged, nor did officials at the Department of Agriculture, at any time, suggest or coerce the incumbents to support the Democratic Party in return for retaining their jobs" (*ibid.*). Based on these findings, the court concluded (*id.* at 11a) that petitioner "has simply failed to establish an infringement of a [First Amendment] constitutional guarantee" under *Elrod* v. *Burns*, 427 U.S. 347 (1976), because "there are no facts in the record to show that [respondent] would have permitted any of these employees to remain if they affiliated with the Democratic Party, no facts to show that [respondent] attempted in any way to require these persons to associate with his own party, or interfered in any way with their exercise of First Amendment rights, as was the case in *Elrod*."

In addition, the district court further determined that the positions in question were "policymaking" positions within the meaning of *Elrod* v. *Burns* (Pet. App. 9a). The court found from the record, including the testimony of several of petitioner's members who had been discharged, that the ASCS State Executive Directors and the FmHA State Directors (*id.* at 4a)

> exercise considerable control over the implementation of the administrator's agricultural program policies at the state and local level, and, thereby, insure either the success or failure of the programs. * * * [Three former directors] testified as to their budgetary authority and their distribution of millions of dollars in a state program. Each State Director supervised a substantial staff which numbered approximately 100 statewide. Each director acted as a public speaker and educator regarding the administration's programs. The director thereby served as the administration's pipeline and advocate at the state and the local level.

Taking into account the directors' responsibilities as well as the Civil Service Commission's classification of these offices as Schedule A positions rather than Schedule C positions (*id.* at 4a-5a, 10a), the court concluded that "[t]he responsibilities of FmHA State Directors * * * and ASCS State Executive Directors * * * are 'policymaking' responsibilities, as that term is defined in *Elrod*" (*id.* at 9a), and therefore that the dismissal of these employees, even if for political reasons, did not violate the First Amendment.

4. The court of appeals affirmed (Pet. App. 23a-36a).[3] The court found that the job descriptions for the two director positions and the testimony offered at the evidentiary hearing "fully justified the district court in concluding that the positions in question were policymaking ones" under *Elrod* v. *Burns* (Pet. App. 31a). The court of appeals also observed that the district court's "conclusion is reinforced by the likelihood that persons administering huge Federal government programs for an entire state will have a high policy component to their activities, both because such large scale exercise of power usually implicates substantive internal policy, and because such positions are a natural source for influential recommendations of changes in policy" (*ibid.*). Finally, the court of appeals agreed (*id.* at 31a-34a) with the district court that the Civil Service Commission's classification of these positions, while relevant, was not determinative on the constitutional issue, and it concluded that petitioner's argument that the agency's interpretation of its governing statute and regulations must be given controlling deference by the courts in this case "misses the point. We are not interpreting the CSC regulations, rather we are defining the constitutional status of the positions held by [petitioner's] members. The question in this case is not what the CSC regulations mean, but whether they are conclusive on the constitutional issue" (*id.* at 32a n.14).

[3] On petitioner's first appeal, the court of appeals initially remanded the case (Pet. App. 12a-13a) to the district court for consideration of a letter dated March 29, 1978 (*id.* at 14a-15a), from respondent to the Civil Service Commission stating that the ASCS State Executive Directors should be designated as Schedule C positions and that the FmHA State Directors should be classified in the career service. This was the second exchange of correspondence between respondent and the Commission concerning the appropriate classifications for these two positions (*id.* at 26a n.6). On remand, the district court, after considering both sets of correspondence, granted respondent's motion for summary judgment and again dismissed the complaint (*id.* at 16a-22a). The court found that these letters did not affect its previous determination that the two director positions were "policymaking" under *Elrod* v. *Burns*, since both positions remained on Schedule A and were not reclassified (*id.* at 18a), the Secretary had subsequently repudiated the view that the position of FmHA State Director properly belonged in the Career Service (*ibid.*), and, of greatest importance, the regulatory classification of a position as policymaking or non-policymaking for purposes of the civil-service system was not conclusive on the First Amendment issue (*id.* at 19a-20a). Petitioner then appealed from this decision of the district court.

With respect to the ground for the Department's dismissal of petitioner's members, the court of appeals noted that there was "uncontroverted testimony that the administration did not know to which political party the incumbents belonged and that [respondent] never attempted to coerce the members of [petitioner's] group to change their party in order to retain their jobs" (Pet. App. 35a). The court also referred to "evidence in the record that the purpose of [respondent's] personnel review was to spotlight incumbents 'of such outstanding qualities that they should be retained' when most incumbents were being replaced 'by individuals who supported the policies and programs of the new administration.' * * * The

district court did not find that the employees were dismissed solely for political reasons, and indeed cited parts of the record that point to a motivation of [respondent] to enhance policy formulation and execution" (*ibid.*). However, since it concluded that the two director positions were policymaking in nature and thus that the discharges were constitutionally valid under *Elrod* v. *Burns* even if politically motivated, the court of appeals did not resolve the question whether the terminations in this case were in fact based solely on political reasons that would be constitutionally impermissible for non-policymaking positions.

ARGUMENT

1. Petitioner principally contends that the Civil Service Commission's "regulations defining the * * * [ASCS State Executive Director and FmHA State Director] positions as non-policy determining and non-confidential, taken together with the letters [between respondent and the Commission], conclusively established that the dismissals constitutionally were impermissible" (Pet. 6), or that, at the least, "the determination of the Civil Service Commission respecting the non-policy determining, non-confidential nature of the positions involved herein is entitled to great deference" (*id.* at 10).

The courts below correctly rejected this contention. For the reasons more fully stated by the district court (Pet. App. 10a, 18a-20a) and the court of appeals (*id.* at 31a-34a), the Commission's regulatory classification is not dispositive on the First Amendment issue. As the court of appeals observed (id. at 32a), "[t]he content and scope of constitutional rights * * * are the special province of the courts." Moreover, the Commission's classification of a position for purposes of the statutory civil-service system is based on different considerations and is designed to further different objectives than is the constitutional analysis required by the First Amendment.[4] While both determinations rest in part on an assessment whether the particular position entails "policymaking" responsibilities, the Civil Service classification, although relevant (*id.* at 34a), is not binding with respect to the constitutional question.[5]

---

[4] The court of appeals explained (Pet. App. 32a-33a):

> What is certainly plain is that the basis of the Commission's distinctions is different from the basis underlying the *Elrod* categories.
>
> * * * *
>
> A court ruling that a position has a policymaking character which makes *Elrod* inapplicable is not to be taken as condemning any action of the Commission in classifying the position as Schedule A. The Civil Service Commission may classify positions as Schedule A rather than Schedule C in order to nudge forward toward the goal of enhancing a "career" civil service.

In addition, as the court of appeals noted (*id.* at 33a n.16), the Civil Service regulations were promulgated more than a decade before this Court's decision in *Elrod* v. *Burns* and were not intended to implement the protections of the First Amendment.

[5] As petitioner recognizes (Pet. 7 n.5), the Schedule A classification covers a wide range of positions with quite disparate duties and responsibilities, including such positions

Furthermore, in *Branti* v. *Finkel*, No. 78-1654 (Mar. 31, 1980), which was decided after the opinions below had been issued, this Court explained that, in cases involving allegedly political dismissals, "the ultimate [First Amendment] inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved" (slip op. 11). Since the proper First Amendment standard is not simply whether the position can be described as "policymaking" in character, the Civil Service classification of a position cannot be considered decisive on the constitutional issue.

2. Petitioner advances the alternative contention (Pet. Supp. 1-3) that this case should be remanded

as a secretary at the Federal Home Loan Bank Board (5 C.F.R. 213.3154(a)); lamplighters in the United States Coast Guard and laborers on the Alaska Railroad in the employ of the Department of Transportation (5 C.F.R. 213.3194(a)(2) and (b); GS-13 to GS-15 professional positions in the Council on Environmental Quality (5 C.F.R. 213.3103(c)); the executive secretary to the U.S.-U.S.S.R. Standing Consultative Commission (SALT) and special advisors in the immediate office of the Secretary and Deputy Secretary of Defense (5 C.F.R. 213.3106(a)(1) and (a)(6); unskilled laborers, temporarily employed by the Department of the Army, who engage in handling ordnance material and ammunition (5 C.F.R. 213.3107(a)(2)); deputy United States marshals employed on an hourly basis for intermittent service (5 C.F.R. 213.3110(a)(1)); and all staff positions on the National Security Council (5 C.F.R. 213.3103(g)). It is evident that the same First Amendment protection against political discharges is not properly applicable to all of these diverse positions simply because they are similarly classified under Schedule A for civil-service purposes.

for further consideration in light of the intervening decision in *Branti* v. *Finkel*.

In our view, the existing record adequately establishes that dismissals of employees from the positions in question here, even if made on political grounds, would not violate the First Amendment. ASCS State Executive Directors and FmHA State Directors are high-ranking officials of the Department of Agriculture. As discussed above (see pages 3-4, 7, 8-9, *supra*), they occupy positions at the GS-13 to GS-15 level, administer budgets of millions of dollars in each state, supervise a substantial state-wide staff of more than 100 persons, and act as public speakers and educators on the administration's programs. More important, these directors are, with regard to their respective programs, the chief federal official in each state. They "exercise considerable control over the implementation of the administration's agricultural program policies at the state and local level, and, thereby, insure either the success or failure of the programs. * * * The director thereby serve[s] as the administration's pipeline and advocate at the state and the local level" (Pet. App. 4a).[6] The officials in-

[6] As explained in *Elrod* v. *Burns*, *supra*, 427 U.S. at 368 (plurality opinion):

> An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

volved here thus stand in stark contrast to the sheriffs' employees discharged in *Elrod* and the assistant public defenders discharged in *Branti*. We believe the findings demonstrate that, even assuming the discharges in this case were based on political grounds, the Department did not violate the First Amendment standard of *Branti* (slip op. 11) and *Elrod* (427 U.S. at 368 (plurality opinion)).

In any event, even if the appropriate course would be to remand the case to the lower courts for reconsideration in light of *Branti* v. *Finkel* if the nature of the directors' responsibilities were the only issue presented, we believe that an additional consideration obviates any need for a remand here.

3. We submit that the findings of the courts below demonstrate that the discharges challenged in this case did not occur for impermissible political reasons.[7] The district court found, based on "uncontroverted" testimony, "that the Carter administration did not know in fact to which political party the incumbents belonged, nor did officials at the Department of Agriculture, at any time, suggest or coerce the incumbents to support the Democratic Party in return for retaining their jobs" (Pet. App. 6a).[8]

[7] The burden of proof on this issue rests upon the discharged employee. See *Branti* v. *Finkel, supra,* slip op. 9.

[8] The district court also noted that one of the discharged directors had been appointed by a previous Democratic administration (Pet. App. 6a).

Contrary to petitioner's assertion (Pet. 5), the district court did not find that these discharges occurred for political reasons. As the court of appeals pointed out (Pet. App. 34a-35a), the quoted comment of the district court, made orally during the course of a hearing, is inconsistent with the formal findings of fact and conclusions of law that were subsequently entered.

Thus, unlike in *Elrod* and *Branti*, these employees were not discharged "solely for the reason that they were not affiliated with or sponsored by the Democratic Party" (*Branti* v. *Finkel, supra,* slip op. 9, quoting *Elrod* v. *Burns, supra,* 427 U.S. at 350 (plurality opinion)).[9] Rather, as the court of appeals observed (Pet. App. 35a, quoting *id.* at 5a, 6a):

> There is evidence in the record that the purpose of [respondent's] personnel review was to spotlight incumbents "of such outstanding qualities that they should be retained" when most incumbents were being replaced "by individuals who supported the policies and programs of the new administration." * * *
>
> ← The district court did not find that the employees were dismissed solely for political reasons, and indeed cited parts of the record that point to a motivation of the Secretary to enhance policy formulation and execution.

Moreover, 35% of the non-veteran incumbent FmHA State Directors, and 15% of the non-veteran incum-

[9] The Court in *Elrod* v. *Burns* further explained that "[i]n order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives" (427 U.S. at 355 (plurality opinion)).

bent ASCS State Executive Directors, were continued in office by the new administration at the time petitioner's members were discharged (see page 5 & note 2, *supra*).

For these reasons, this case is of an altogether different stripe than *Elrod* v. *Burns* and *Branti* v. *Finkel*. No question is presented here of dismissals for reasons of political affiliation. Instead, employees were discharged if they were neither of outstanding quality nor in agreement with the policies and programs of the new administration. In our view, such personnel actions concerning these high-ranking positions do not raise a colorable claim of a First Amendment violation, for, as the Court recognized in *Branti* v. *Finkel*, *supra*, slip op. 13 n.14, "[t]o the extent that [respondent] lacks confidence in the assistants he has inherited from the prior administration for some reason other than their political affiliations, he is, of course, free to discharge them." In the circumstances of the present case, we believe that the discharges were justified by the governmental interest in the "loyalty of employees * * * to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod* v. *Burns*, *supra*, 427 U.S. at 367 (plurality opinion).

In sum, since the uncontroverted evidence in the record discloses that the dismissals in this case were not based on impermissible political grounds, the threshold element of a First Amendment cause of

action has not been satisfied.[10] Because the Court's recent decision in *Branti* v. *Finkel* is addressed solely to the proper standard to be applied once it has been determined that a governmental employee has been discharged because of his political affiliation, that decision has no application here. Hence, it is unnecessary to vacate the judgment below and to remand for reconsideration in light of *Branti* v. *Finkel*.[11]

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[10] We also note that a new statute governing the federal civil service has been enacted since this litigation was initiated. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. (Supp. II) 1101 *et seq.* Among other things, the Act provides that, with respect to a "covered position" (5 U.S.C. (Supp. II) 2302(a)(2)(B)), no discrimination against an employee shall occur "on the basis of * * * political affiliation, as prohibited under any law, rule, or regulation." 5 U.S.C. (Supp. II) 2302(b)(1)(E); see also 5 U.S.C. (Supp. II) 2301(b)(2), 2301(b)(8), 2302(b)(3). In addition, the Act establishes a mechanism, under the direction of a Special Counsel whose position and independence are protected by statute, to investigate alleged violations of the Act and to bring disciplinary actions for such violations. 5 U.S.C. (Supp. II) 1204, 1206. The Act also recognizes an employee's right of appeal from adverse personnel actions to the Merit Systems Protection Board. 5 U.S.C. (Supp. II) 1205. Thus, should dismissals of the kind challenged herein arise in the future, they will be subject to administrative procedures under the Act to determine whether a covered position is involved, whether the discharge resulted from discrimination on the basis of political affiliation, and whether such action on grounds of political affiliation is prohibited by any law, rule, or regulation.

[11] *Delong* v. *United States*, No. 78-1847 (4th Cir. May 13, 1980), is not to the contrary. In *Delong*, the former FmHA State Director for Maine was reassigned and transferred to Washington, D.C., as part of the Department of Agriculture's

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1980

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review process following the change of administrations in 1977. In pertinent part, the court of appeals remanded the case to the district court for an analysis of the particular position at issue in light of *Branti* v. *Finkel* and for a determination whether the transfer and reassignment constituted, on the specific facts presented there, an unconstitutional burden upon protected First Amendment rights. The court in *Delong* did not address the question whether the transfer and reassignment in that case were based on impermissible political grounds—an inquiry that, in our view, is central to the proper disposition of the instant petition. In his concurrence in *Delong*, however, Judge Dumbauld noted that "the transfer complained of was merely a 'new broom' replacement of [*Delong*] by someone his superior felt he could work with more satisfactorily" (slip op. 17) and that "the new *Branti* criterion will be no more helpful to [*Delong*] than the *Elrod* test was" (*id.* at 18 n.5).

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